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COMPREHENSIVE EXAMINATION OF THEMATIC ISSUES RELATING TO RACISM, XENOPHOBIA, MINORITIES AND MIGRANT WORKERS

Towards a comprehensive programme for the prevention of discrimination and protection of minorities, including proposals for the examination of thematic issues relating to racism, xenophobia, minorities and migrant workers: some suggestions

Working paper submitted by Mr. Asbjørn Eide

Background

1. In its decision 1995/110, the Sub-Commission, taking into account the working paper prepared by Mr. Asbjørn Eide presented at its forty-sixth session (E/CN.4/Sub.2/1994/36 and Corr.1) decided to request Mr. Eide to prepare, without financial implications, a second working paper containing further suggestions for a comprehensive programme for the prevention of discrimination and protection of minorities, including proposals for the examination of thematic issues relating to racism, xenophobia, minorities and migrant workers, to be presented at its forty-eighth session and to request Mr. Eide to take into account the discussion and the proposals made during the joint meeting between the Sub-Commission and the Committee on the Elimination of Racial Discrimination on 8 August 1995.

2. The present paper is submitted in response to that request. It is kept deliberately brief, for two reasons. It is only intended to make some suggestions here for further discussion by the members of the Sub-Commission, and it is kept brief owing to the costs of documentation, including translation.

A. The approach of this paper

3. The present paper has a limited purpose. It is not a study but only a working paper for input in the discussion, and it therefore contains no comprehensive analysis of the issues involved. A few theses will be presented, for the purpose of discussion. It is hoped that benefit will be derived from the insights of all the members of the Sub-Commission. A discussion can contribute to a broader understanding of the challenges currently being faced and the choice of appropriate responses.

4. The paper very briefly reviews the considerable achievements made by the Sub-Commission over its almost 50 years of history and examines present challenges, both those facing the international society and its various components, and the challenges to the United Nations and its organs, including the Sub-Commission itself. It then explores some elements which have to be taken into account in the formation of a strategy and ends by exploring some themes in need of further examination.

B. Past achievements of the Sub-Commission

5. The Sub-Commission has major achievements to its credit. Over its nearly 50 years of existence, it has played a central role in the drafting of international standards, mainly but not only in the field of prevention of discrimination and to a lesser extent in the protection of minorities. Some of its past contributions to standard-setting and action in the elimination of racism were listed in the first working paper, including the drafting of the Declaration and later the Convention on the Elimination of All Forms of Racial Discrimination and the preparation of the Declaration on Religious Intolerance, and its role in preparing the ground for standards with regard to the prevention of discrimination in the area of education, in political rights and on equality in the administration of justice. Pride of place should be given to the outstanding contribution made by the Sub-Commission in mobilizing action against apartheid. Another area in which the Sub-Commission can take great pride is its work concerning the prevention of discrimination against indigenous peoples. The comprehensive study prepared for the Sub-Commission by Mr. Martínez Cobo was followed by the establishment and the wide-ranging activities of the Working Group on Indigenous Populations, under the Chairmanship of Ms. Erica Daes and with the extensive participation of representatives of the indigenous peoples themselves, as well as of Governments concerned. The Working Group completed the draft declaration on that subject in 1993 and it is now before the Commission on Human Rights.

6. The Sub-Commission has also endeavoured to secure adequate protection for members of minorities, a significant contribution to which was the study by Mr. Francesco Capotorti in the 1970s. One of the follow-up activities was the drafting, by the Commission on Human Rights, of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly in 1992, followed by the study submitted to the Sub-Commission by the present writer on ways and means to facilitate peaceful and constructive solutions to situations involving minorities. This led to the establishment of the Working Group on Minorities, which is now in the middle of its first mandate.

7. The Sub-Commission has taken numerous initiatives which have spurred the Commission on Human Rights to develop more effective mechanisms for the promotion and protection of human rights. It will undoubtedly continue to be an essential element within the human rights machinery of the United Nations, but it is essential to reflect on the nature of the challenges being faced in order to develop the most appropriate responses.

C. Present challenges confronting international society and the United Nations

8. In the working paper presented in 1994, some of the new challenges being faced were identified and it was noted that the situation which had arisen during the previous three or four years had been a harbinger of new and serious dangers. Aggravated, new forms of discrimination had emerged, going far beyond discrimination in jobs and housing. Massive "ethnic cleansing" and massacres, bordering on genocide, and huge flows of refugees and internally displaced persons could be observed. Some approaches and attitudes had been demonstrated which constituted a head-on challenge to the very foundation of human rights, a challenge to the principle of equality and non-discrimination irrespective of colour, race and ethnic or national background.

9. Two related phenomena observed in many parts of the world were also commented on in that working paper: the language, ideology and actions of xenophobia, and the language, symbols and in particular actions of extreme nationalism. Both have an element in common: the dogmatic assertion of the desirability of ethnically or culturally homogeneous societies, leading to a rejection of those who are different or deprivation of their possibility to assert their own identity as members of the group concerned.

10. One positive sign is that past policies of more or less enforced assimilation are decreasing. This reduces the denial of the group identity of national or ethnic, cultural, religious and linguistic minorities. Unfortunately, however, there is a counter-trend which is particularly scaring: ethnic "cleansing", through massacres and unspeakable crimes, carried out by groups which are pitted against other groups.

11. It was also noted that in many places xenophobia is manifested against migrant workers and other aliens. While the main authors of violence against migrants are marginal elements in society, unemployed, young, frustrated and angry, it can be observed that their activities have caused responsible Governments also to become much more restrictive towards aliens and migrant workers, making increasingly difficult access for them to the countries where the job market is, and stepping up policies of expulsion and denials of residence permits.

12. While some of the brutality at present observed might be seen as blind and irrational violence between members of groups, it was noted that in many cases these are initiated or exploited by what can be called conflict entrepreneurs, persons who have their own political agenda and who in their own quest for power make use of the feelings of demographic stress and personal insecurity among the public at large. If this observation is correct, it was argued, it is incumbent on the international community to help and assist responsible Governments, as well as responsible representatives of

the various groups concerned, to find peaceful and constructive solutions to their concerns without physical violence and without violating international or national law.

13. On subsequent reflection, the writer has come to believe that the present malaise reflects much deeper trends in the evolution of the international system. It is not possible to discuss this in any greater detail here, but the following observations can be made.

14. It is commonly recognized that the world is going through some significant changes compared to the situation which existed at the time when the Universal Declaration was adopted, and even at the time when the two Covenants were adopted in 1966. These changes are driven mainly by the evolution of economic and technological relations, and they profoundly influence the roles and functions of the State as an organization. This process plays itself out differently in different parts of the world. It has been alleged that there is a shift from the territorial State to the "virtual State"; that it will be much more important to control capital and technology than to control territory, and that the differentiation between different parts of the world will be based on where the headquarters are of major multinational companies as compared to the places where production is carried out. Linked to this is the question of where the leading educational institutions are and where the technological innovations take place.

15. Attention should be given to two apparently contradictory processes: on the one hand a process of globalization, and on the other hand a resurgence of nationalism and of ethnic or religious identities, including phenomena often referred to as fundamentalism. It is submitted that these assertions of identity constitute some kind of a defence against the negative effects, whether real or imagined, of the processes of globalization. To some extent, these defence mechanisms are not only understandable, but possibly even necessary in order to try to create a more egalitarian world in conformity with the vision contained in the Charter of the United Nations. The search for national sovereignty can have the positive implication of defending the inhabitants of a country against destabilizing influences from the outside. It can be a necessary mechanism in order to maintain or create a domestic social order based on social justice and non-discrimination between the different groups. However, it can also have severe negative effects in terms of discrimination and exclusion. The problem of intolerance, particularly on religious grounds, is the reverse side of efforts to re-emphasize morality based on traditional religion.

16. The characteristics of globalization are, inter alia, an increasingly free flow of capital and investments across borders, combined with an unprecedented freedom to repatriate profit to the countries of origin of the investment; a relatively free flow also of technology, with its consequences in terms of changes in patterns of production and with substantial impact on social organization; and in addition an increasingly free flow of information and communication, with its positive and negative consequences, which might require further elaboration. There is no comparable free flow of labour to those countries where profit is repatriated and where, therefore, a significant part of the investments take place.

17. It is important to recognize that these processes are not egalitarian. The dynamics originate in certain parts of the world, and other parts of the world are facing the consequences of these dynamics which have not been chosen by them. To a large extent the push for globalization comes from the north-western part of the world, though countries and societies in East and South-East Asia have in recent times generated and expanded their own push for globalization and have become central actors in the process.

18. The emergence of something which is romantically called the "global village" is said to be taking place. If indeed there is a development in the direction of some kind of integration of the world, it also has to be recognized that within that village there are tremendous differences, almost approximating a cast-structured society at a global level. While some parts of the world population live in abundance, more than one billion human beings still live in abject poverty. There are some who hold power and influence, while others are the targets of the use of that power and influence. In the face of the increasing globalization, there is a resurgence of a quest for identity intended in part to serve as defence and in part to restore or obtain a relative power position within the international system.

19. The writer submits that these processes contribute to tensions and instability which can be observed in all parts of the world, also within the traditionally leading industrialized countries. They have contributed to the substantial levels of structural unemployment in Western European countries and to a severe decrease in levels of income for many workers in the United States. This, in turn, has intensified both antagonism towards migrant workers and other aliens, and the re-emergence of racial attitudes, including increasing challenges to affirmative action programmes.

20. A number of the issues to be examined in this paper are linked to the processes described above, others are not. Racial discrimination is still an important factor in contemporary life. Its main manifestation remains discrimination based on colour, manifesting itself principally in the interaction between the "white" and "non-white" population groups. It is linked to, but should be separated from, certain phenomena of group conflicts, including the severe ethnic conflicts in Rwanda, Burundi and in some other parts of Africa. The need to prevent future conflicts of this kind is essential, but adequate measures have not yet been found by the United Nations.

21. There is also a thin line between racial discrimination and xenophobia directed against certain categories of migrant workers in several parts of the world. Another severe and persistent form of discrimination in some parts of the world is that of anti-Semitism, a strange mix of residual, traditional Christian religious intolerance, cultural rejection and confused racial stereotyping. Semitic and hamitic peoples other than Jews, including Arabs, are also targeted for discrimination in some European countries and are therefore specifically covered by the mandate of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Maurice Glèlè-Ahanhanzo.

D. Requirements for the development of a broader strategy

22. In order to reflect on the activities which can be pursued, it is necessary to start with a re-examination of the mandate of the Sub-Commission, which is: (a) to undertake studies, particularly in the light of the Universal Declaration of Human Rights, and to make recommendations to the Commission on Human Rights concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities; (b) to perform any other functions which may be entrusted to it by the Economic and Social Council or the Commission on Human Rights.

23. The Sub-Commission can take independent initiatives, under part (a) of its mandate, to study any matter relating to prevention of discrimination of any kind, and to the protection of minorities. Discrimination "of any kind" clearly includes discrimination not only on the grounds of race and ethnicity, but also discrimination against migrant workers. The Sub-Commission should recognize the relationship between its two tasks of prevention of discrimination and protection of minorities.

24. The Sub-Commission has defined prevention of discrimination as the prevention of any action which denies to individuals or groups of people equality of treatment which they may wish. 1/ It has defined the protection of minorities as "the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population".

25. Prevention of discrimination is essential, but not always sufficient. It must include a concern with equality in fact, including equality for the members of the different groups in society in maintaining their own culture, religion and identity. To achieve such equality, however, the minorities must not be given privileges which create new inequality. The balancing acts between these two concerns can indeed be very difficult.

26. The Sub-Commission has certain comparative advantages in addressing these matters: first, it is not a political, but an expert body and can therefore examine the issues without being bound by the same restrictions as those who constantly have to take competing national interests into account. Second, unlike the treaty bodies which are also composed of experts, the Sub-Commission is not limited in its role to the implementation of standards defined in a particular treaty in relation only to the States parties to that treaty, but can pursue overall analysis and propose new approaches and initiatives. It can even suggest the elaboration of new or more precise standards. Third, the Sub-Commission is in the fortunate position of enjoying the presence and active participation at its sessions of a large number of non-governmental organizations from many parts of the world, in many ways the

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1/ For details of the history of the Sub-Commission, see Eide, Asbjørn: "The Sub-Commission on Prevention of Discrimination and Protection of Minorities" in Alston (ed). The United Nations and Human Rights, Clarendon Press, Oxford, 1992.

embodiment of a transnational civil society in formation. With their respective insights and suggestions they can, and to a large extent do, enrich debates of the Sub-Commission and can bring it closer to a realistic understanding of the actual processes taking place.

27. The Sub-Commission needs to seek better coordination with other United Nations bodies and also regional agencies. It is essential to reflect on the best ways in which the Sub-Commission can serve the needs of the High Commissioner on Human Rights through its analysis and recommendations. It is also essential to be aware of and draw lessons from the work of the specialized agencies and other bodies, such as ILO, UNESCO and UNHCR. It would be desirable to discuss ways in which such cooperation could be strengthened within the field of prevention of discrimination and protection of minorities.

28. Of special importance is the contact with the Committee on the Elimination of Racial Discrimination (CERD), and it is therefore gratifying that two joint meetings have been held (in 1992 and 1995) and that both sides have expressed an interest in future contact and cooperation.

29. The role of CERD is more and more demanding: monitoring the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, pursuing dialogue with States, taking urgent action, and seeking to develop a climate of confidence and cooperation in which States are willing to accept criticism and take the necessary corrective measures. The development of early warning and urgent action mechanisms by CERD from 1993 is much to be welcomed.

30. The members of CERD have by now substantial competence concerning legislation and judicial practice in the field of prevention of racial discrimination. It would be desirable for this to be made use of as part of the advisory services of the Centre for Human Rights. States should be encouraged to ensure that their national legislation fulfils all the aims and goals contained in the Convention and to train their officials to comply with those norms. It would also be desirable for them to develop a comprehensive programme of human rights education already from the earliest years of school, and for this purpose to make use of the advisory services of the United Nations. The members of CERD and the Sub-Commission might be called upon, in the light of their expertise, to assist in these educational efforts, together with the Centre for Human Rights.

31. It is desirable that the work of CERD should become more widely known and that there should emerge an awareness that the problem of discrimination exists in all parts of the world. It has been suggested, and the Sub-Commission should endorse the suggestion that regional seminars should be organized in all five regions of the world to focus on forms of racism and xenophobia in the region in which each seminar was held. These regional seminars could be organized under the auspices of CERD, but the members of the Sub-Commission from the region in question could also possibly play a role.

32. The Sub-Commission can benefit substantially from the work of CERD. As an example, it has been suggested that in discussing the possible adoption of resolutions concerning a country, the Sub-Commission should study the reports presented to CERD by that country and the commentaries thereon by the Committee.

33. The two bodies should continue their dialogue on the role they can play jointly and separately during the Third Decade to Combat Racism and Racial Discrimination and in the preparatory work for the proposed world conference against racism, racial and ethnic discrimination, xenophobia and other forms of intolerance. As a minimum, they should both present a report focusing on their respective activities in the prevention of discrimination. The report should preferably also make proposals for further action.

34. It is also essential for the Sub-Commission to maintain contact with the Special Rapporteur of the Commission on Human Rights on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Mr. Maurice Glèlè-Ahanhanzo. Through his work the Sub-Commission can become better informed of the current manifestations of racism and racial discrimination in various parts of the world. Close attention should be paid to the proposals contained in his reports.

E. Conclusion: Ambiguities and thematic issues worth attention

35. In the field of standards, the International Convention on the Elimination of All Forms of Racial Discrimination covers the existing needs well. It is to be hoped that those States which have not ratified the Convention will do so in the near future.

36. There are some ambiguities, however, which could bear further clarification. In addition, there are some national practices which should be explored in the light of the requirements contained in the Convention. Among these are the following.

37. The issue of affirmative action in favour of groups previously discriminated against is a subject strongly debated in countries such as South Africa and the United States. The interpretation of racial discrimination (art. 1) and the assertion that affirmative action constitutes "reverse discrimination" should be further investigated; so should the scope of the obligations and the limits to affirmative action under article 2.2. It would be desirable that CERD conduct such a study, exploring also the situation in countries which have not ratified the Convention.

38. Another hotly debated issue is the relationship between freedom of speech and association, on the one hand, and the prevention and prohibition of hate organizations and hate speech on the other. In particular, the role of the mass media in stirring up hatred, and ways in which this can be prevented or countered. (The example of Radio Mille Collines as a contributor to the acts of genocide in Rwanda can be used as an illustration.) Further study of national practices in the light of article 4 of the Convention would be desirable.

39. In the development of programmes for human rights education, it is essential to take into account the provisions of article 7 of the Convention, under which States have undertaken to take measures in the fields of teaching, education, culture and information with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial groups. It appears highly desirable to study the implementation of this commitment and to evaluate the effectiveness of the measures adopted, with a view to the development of international guidelines for appropriate programmes in this field. It would also be desirable to involve UNESCO in this task.

40. The Sub-Commission has made great achievements regarding the rights of indigenous peoples. The draft United Nations declaration on the rights of indigenous peoples is now before the Commission on Human Rights. It is to be hoped that it will soon be finalized and transmitted to the General Assembly for adoption. In the meantime, further work should be done to develop effective mechanisms for effective monitoring of the implementation of the future declaration.

41. The rights of persons belonging to minorities have been formulated in rather vague terms in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by the General Assembly in 1992. These standards require further precision and improved international monitoring. More importantly, there is a need for a better dialogue between minorities and majorities inside States. The Working Group on Minorities of the Sub-Commission is intended to contribute to these tasks. At the completion of its first three-year mandate, in 1997, it will bring to the Sub-Commission and through it to the Commission specific proposals on further action in this field.

42. Several difficult issues have emerged in this context. Some of them could require separate studies. One is the controversial issue of the relationship between the territorial integrity of sovereign and independent States, the principle of non-intervention (which also applies to the so-called "kin States", but is not always respected), the prohibition and prevention of "ethnic cleansing" and the right of peoples to self-determination. A study of this tangled relationship could be helpful in discouraging future violent confrontations between groups inside States.

43. In the light of the frequency of internal armed conflicts, which are often related to ethnic confrontations, it is essential to increase awareness of the minimum standards of humanity which have to be respected by all parties at all times. This issue is now before the Commission after the transmission to it in 1994 by the Sub-Commission of a draft declaration on minimum humanitarian standards. It is to be hoped that a consensus can soon be obtained on this subject.

44. Another important contemporary problem is the vagueness of international law concerning the allocation of citizenship, particularly in new or in newly independent countries. This vagueness generates considerable difficulties for

human rights. Practices concerning citizenship can have a great impact on discrimination between groups. It would be desirable for this issue to be explored in greater depth by the Sub-Commission, initially through a working paper, which would serve as the basis for subsequent discussion.

45. The most serious lacunae in the field of standard-setting or monitoring of relevance to discrimination and xenophobia concern the situation of aliens and stateless persons. It is recommended that the Sub-Commission now give priority attention to the issue of the treatment of such persons, including those who have recently been disenfranchised or denied citizenship in the context of States' newly acquiring or regaining their independence. Not only the civil rights, but also the economic and social rights of these groups need to be investigated. There are serious indications that in some countries aliens and stateless persons are becoming more vulnerable than before.

46. Special attention should be given to the practices of detention and imprisonment of aliens and stateless persons. There appears to be a strong need to investigate the extent of these practices, the causes of detention, the length of detention without or before trial, and the judicial guarantees provided to these prisoners. There are serious indications that aliens and stateless persons make up a growing number of the prison population in many countries, and that in many instances they have little possibility of effective redress. While some aspects of this situation are monitored by UNHCR, many of them fall outside the scope of that Office and have so far not been given proper attention by human rights bodies.

47. The problem of the deportation of aliens, which appears to be occurring to an increasing degree, should also be investigated. Even legally resident aliens are increasingly being deported as an additional sanction when they have committed unlawful acts, in spite of the hardship deportation can cause for their families. The need for restrictions on deportations and expulsions should be investigated. More precise standards and international monitoring appear to be required. This might form another subject which the Sub-Commission could address.

48. The lack of ratification of the International Convention on the Rights of All Migrant Workers and Members of Their Families is indicative of the relative neglect by States of the rights of these persons. The situation of migrant workers and "unaccounted workers" should be examined, including their enjoyment of economic and social rights, inter alia the rights to work, to social security, to food and housing, to health and to education. Attention should also be given to their freedom of movement in search of work within the area of regional organizations such as the European Union, compared with the freedom of movement of other workers who are citizens of the member States of the European Union.

49. A final word in conclusion: there are limits to the amount of work the Sub-Commission can do. It is essential that it coordinate its activities with those of other bodies, and that other organs and agencies deal with those issues that they are best equipped to handle. As for the Sub-Commission

itself, studies are important, but a ceiling has been placed on the number of formal studies with financial implications. Authority for such studies to be undertaken can be given only by the Commission on Human Rights and the Economic and Social Council.

50. The Sub-Commission can carry out its work in other ways, however. It is free to establish sessional working groups, though this creates problems for the rest of its work programme because of limits on the amount of interpretation time available. Initiatives can be taken, however, through working papers requested by the Sub-Commission itself or at the initiative of individual members, followed by discussion in its plenary meetings.

51. Ultimately, it is a question of setting priorities within the limited time available to the Sub-Commission. In setting these priorities, the primary mandate - prevention of discrimination and protection of minorities - should guide its work.